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No. 73-482

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

STATE OF MICHIGAN,
Petitioner,

vs.

THOMAS W. TUCKER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF CIVIL LIBERTIES COMMITTEE, STATE BAR OF MICHIGAN AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the Prosecutor of Oakland County Michigan, counsel for the Petitioner, and by Kenneth M. Mogill, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The views expressed herein are those of the State Bar of Michigan, Committee on Civil Liberties only and do not necessarily represent the views of the Bar as a whole.

The State Bar of Michigan Committee on Civil Liberties was established by the parent organization to consider the

effect of legislation, legal decisions and state action on the civil liberties and Constitutional rights of Michigan citizens. It is the belief of the Michigan State Bar Civil Liberties Committee that this case raises serious questions as to the preservation of Constitutional liberties presently possessed by citizens of the State of Michigan. The Civil Liberties Committee of the Michigan State Bar has been actively involved in the protection of the civil liberties of Michigan citizens with the recognition that the liberties of its citizens must be preserved but balanced with rational police conduct. It is the belief of the Committee that the retention and advancement of presently held Constitutional rights of Michigan citizens best protects their rights, the effectiveness of Michigan's law enforcement agencies, and the administration of justice in Michigan Courts. Any retrenchment on present policies would not improve law enforcement practices, would grievously and irreparably harm the civil liberties of Michigan citizens and incalcuably impair the administration of justice in Michigan courts.

SUMMARY OF ARGUMENT — ISSUE I

Traditional notions of Fourth and Fifth Amendment guarantees recognize that the vitality of these Amendments lies in their mutual interdependence as well as their mutual dependence upon exclusionary rules evidence. Such exclusionary rules operate to render inadmissible evidence directly obtained by illegal methods, and any form of evidence derived from investigative leads arising from the initial illegal intrusion. The application of the exclusionary rules of evidence to *Miranda* violations, finds its justification in the concentricity of Fourth and Fifth Amendment protections forming the basis of the *Miranda* requirements. The exclusionary rules of evidence are virtually the only viable means of insuring the vindication of an individual's constitutional rights in the face of unwarranted government intrusion. The government is thus forwarned that any illegal activity will not be judicially sanctioned by acquiescing in admission into a court of law evidence ob-

tained through illegal methods. The exclusion of direct evidence as well as derivative evidence, be it testimonial or physical in nature, furthermore, serves the essential purpose of insuring the integrity of the judicial process.

SUMMARY OF ARGUMENT — ISSUE II

The deleterious impact of the *Miranda* standards, forewarned by the dissents in *Miranda* and by critics of the *Miranda* majority, have failed to materialize. Post-*Miranda* studies assert that while the number of confessions obtained by law enforcement officials has declined, convictions in the post-*Miranda* period have remained constant or have risen. Moreover, law enforcement officers concede that *Miranda* has presented no serious impediment to effective law enforcement. The *Miranda* warnings represent a consistent, easily implemented standard by which law enforcement personnel can advise a suspect of Constitutional rights which obtain during custodial interrogations. The warnings are currently an integral, non-disruptive requirement of the law enforcement function.

A regression to the "totality of the circumstances" test for determinations of voluntariness, as suggested by Petitioner, would serve to reimplement an ineffective and unmanageable standard. It would encourage technical and "minor" violations of individual Constitutional rights in order to obtain confessions. A return to the totality test will signify that trials, in confession cases, represent only an appeal from a "successful" interrogation.

This Court properly determined in *Miranda* that custodial interrogations are inherently coercive. *Miranda* warnings assist in militating against such coercive pressures. *Miranda* safeguards and encourages the exercise of individual Constitutional rights without significant deleterious effects upon law enforcement officials or the administration of justice. Abandonment of these safeguards would have no basis either in logic or precedent. *Miranda* v *Arizona* should be retained in its entirely.

SUMMARY OF ARGUMENT — ISSUE III

The question of whether federal habeas corpus is an appropriate forum for reviewing alleged violations of a petitioner's Fifth Amendment rights is also before this Court. Amici first urges this Court to closely scrutinize the contention put forth by some that federal habeas corpus jurisdiction should be limited to cases which present a colorable claim of innocence. Such a proposition clearly intimates a greater federal involvement in the retrying of facts already resolved by the state trial courts. Thus, the proposition is counterproductive to the desired ends of preserving state court integrity and autonomy and, ultimately, minimizing friction between the state and federal judicial systems.

To put forth an argument that federal habeas corpus jurisdiction should be concerned with a colorable claim of innocence is to misunderstand the institutional setting of state court criminal proceedings vis-a-vis federal habeas corpus collateral review. State courts tend to have as their *primary* objective the enforcement of state substantive criminal law, and therefore may subordinate the individual's right to protection from improper state action. The federal courts are in a unique position, being a step removed from the overriding (state) goal of enforcement of state law, to undertake an objective second look at the state's application of the Constitution to the factual setting of the case. Thus, the colorable claim of innocence theory misses the crucial point that, in light of the distinct institutional function of the federal courts (as opposed to the state courts), the federal courts must be concerned with the factual setting of a case *only insofar* as it is necessary to review whether the state jurisdiction correctly applied the Constitutional standard in issue to the facts.

Amici also have brought to the Court's attention the fact that, even if this Court should limit federal habeas corpus jurisdiction in relation to appeals based on Fourth Amendment exclusionary violations, as suggested by Mr. Justice Powell's concurring opinion in *Schneckloth* v *Bustamonte*, no such limitation should be placed on federal

habeas review of Fifth Amendment claims. The reason for such a stance is based on the nature of the protections afforded by each Amendment. If the argument that the nature of Fourth Amendment protections focus on the security of one's privacy from state intrusion is meritorious, then it might be concluded that a Fourth Amendment violation does not touch upon the fairness of the trial itself, and therefore should not be grounds for federal habeas review. However, it is generally agreed that the Fifth Amendment cuts to the very heart of the truth-determining process, especially when considered in light of custodial interrogation. As a consequence, the reliability of the truth-determining process and fairness of the trial is usually in issue when a Fifth Amendment question is at stake. Thus, the considerations used to buttress the argument for limiting federal habeas corpus Fourth Amendment review are inapplicable to a discussion of any possible limitation on federal habeas corpus Fifth Amendment review.

ARGUMENT

I. Where statements are obtained from a criminal accused in violation of *Miranda* v *Arizona*, derivative evidence obtained as a fruit of that illegality must be suppressed, whether that evidence be physical or testimonial in character.

Miranda v *Arizona*, 384 US 719, 86 S Ct 1772, 16 L Ed 2d 694 (1966) applying the Fifth Amendment held that all statements made by one who is "in custody" at the time of their declaration, whether they are characterized as confessions or as admissions, inculpatory or exculpatory, be excluded from the evidence if the *Miranda* warnings were not properly given and if no valid waiver is made of the privilege against self-incrimination. Not only is the direct statement to be suppressed but incriminating evidence derived from investigative leads resulting from the direct statement regardless of whether that derivative evidence

be testimonial or physical in nature, must also be suppressed. *Wong Sun* v *United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963); *Nardone* v *United States*, 308 US 388, 60 S Ct 266, 84 L Ed 307 (1939); *Silverthorne Lumber Co* v *United States*, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920); *Davis* v *Mississippi*, 394 US 721, 81 S Ct 1394, 22 L Ed 2d 676 (1969); *Kastigar* v *United States*, 406 US 441, 92 S Ct 1653, 32 L Ed 2d 212 (1972). Such a rule is virtually the only jurisprudential method capable of effectively vindicating Fourth and Fifth Amendment constitutional guarantees to inviolate personality: the Government is forewarned that an illegal intrusion upon these constitutional rights should not be sanctioned by participation in the wrong through judicial acquiescence in the use of illegally obtained evidence.

As a practical matter, the rule excluding all forms of derivative evidence is of importance in terms of possible undesirable restraints on law enforcement processes. Clearly, police interrogate suspects to obtain either (1) statements that can later be presented in court as evidence, or (2) leads from a suspect on the basis of which they can discover real or demonstrative evidence, or identify prosecution witnesses, and thus present a persuasive array of proof in court. Such purposes and procedures are unquestionably an integral part of effective law enforcement and investigation of crime. That these purposes and procedures have not been adversely affected by the *Miranda* exclusionary rule is manifest from the abundance of studies examining this precise concern cited elsewhere in this amicus curiae as well as in Respondent's Brief. To the contrary, these studies evince the general conclusion that *Miranda's* effect on criminal convictions has been at worst negligible, and at best a positive inspiration for more scientific, professional and precise law enforcement practices. Little factual support exists, therefore, for seriously arguing that an exclusionary rule requiring the suppression of evidence derived from statements obtained in violation of *Miranda*, will traumatize and debilitate law enforcement.

The exclusionary rule as it relates to derivative evidence has long been considered a legitimate and essential method

of insuring the enforcement and integrity of Fourth Amendment Constitutional rights. The purpose of such exclusionary rules is clearly not always to insure the trustworthiness of the evidence so derived. Rather, the exclusionary rule has been utilized to enforce the Fourth Amendment mandate requiring respect for the sanctity of the division of governmental powers concept: that the executive function of law enforcement shall be separate from and reviewable by the judicial branch, i.e. before the executive shall act to invade a citizen's privacy through arrest, search, or seizure, the legitimacy of that action shall be passed upon by objective and neutral judgment of the judiciary. *Johnson* v *United States*, 333 US 10, 68 S Ct 361, 92 L Ed 436 (1947); *Mapp* v *Ohio*, 367 US 483, 81 S Ct 1684, 6 L Ed 2d 1081, (1961); *Weeks* v *United States*, 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914).

The very integrity of the individual citizen's Fourth Amendment right to be free from illegal search and seizures is itself an independent justification for the exclusionary rule. *Coolidge* v *New Hampshire*, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971); *Davis* v *Mississippi*, 394 US 721, 89 S Ct 1394, 22 L Ed 2d 676 (1969). Furthermore, the individual citizen's right to privacy insured by the Fourth Amendment, is vindicated by the exclusionary rule which suppresses the statements of the individual obtained without his knowledge and permission or without a search warrant. *Katz* v *United States*, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967). To virtually every aspect of Fourth Amendment rights the exclusionary rule of evidence as well as the derivative evidence exclusionary rule have been applied.

Respondent submits that no good reason exists not to apply the derivative evidence exclusionary rule to the Fifth Amendment, and that, in fact, logic and precedent compels such a result.

The historical legal precedent most frequently celebrated as the antecedent for the Fourth and Fifth Amendments is *Entick* v *Carrington*, 19 Howell's State Trials 1029 (CP 1765). In *Entick*, Lord Camden laid down two distinct principles: that general search warrants are unlawful because of their uncertainty; and that searches for evidence

are unlawful because they infringe the privilege against self-incrimination:

> "It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, failing upon the innocent as well as the guilty, would be both cruel and unjust, and it should seem, that search for evidence is disallowed upon the same principle." at 1073.

Lord Camden's double focus was carried over into the structure of the Fourth Amendment. See Lasson, "The History and Development of the Fourth Amendment to the United States Constitution" (1937); Fraenkel, "Concerning Searches and Seizures" 34 Harv L Rev 361 (1921). The two clauses of the Fourth Amendment are in the conjunctive, and plainly have distinct functions. The Warrant Clause was aimed specifically at the evil of the general warrant, often regarded as the single immediate cause of the American Revolution. See 10 John Adams, Works 247. But the first clause embodies a more encompassing principle. It is, in light of the *Entick* decision, that government ought not to have the untrammeled right to extract evidence from people. Thus viewed, the Fourth Amendment is complimentary to the Fifth. *Feldman* v *United States*, 332 US 487, 64 S Ct 1082, 88 L Ed 1408 (1943). In *Boyd* v *United States*, 116 US 616, 633, 6 S Ct 524, 29 L Ed 746 (1885), the U.S. Supreme Court described the vital interaction of the Fourth and Fifth Amendments this way:

> "We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the

meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

Boyd's basic principle, that the Fourth and Fifth Amendments interact to create a comprehensive right to inviolate personality has been repeatedly approved in the decisions of the U.S. Supreme Court. *Bram* v *United States*, 168 US 532, 18 S Ct 183, 42 L Ed 568 (1897); *Hale* v *Henkel*, 201 US 43, 26 S Ct 370, 50 L Ed 652 (1905); *Weeks* v *United States*, *supra*; *Gouled* v *United States*, 255 US 298, 41 S Ct 261, 65 L Ed 647 (1920); *Amos* v *United States*, 255 US 313, 41 S Ct 266, 65 L Ed 654 (1920); *Agnello* v *United States*, 269 US 20, 46 S Ct 4, 70 L Ed 145 (1925); *McGuire* v *United States*, 273 US 95, 47 S Ct 259, 71 L Ed 556 (1927); *United States* v *Lefkowitz*, 285 US 452, 52 S Ct 420, 76 L Ed 877 (1931); *Feldman* v *United States*, *supra*; *Davis* v *United States*, 328 US 582, 66 S Ct 1256, 90 L Ed 1453 (1945); *Zap* v *United States*, 328 US 624, 66 S Ct 1277, 90 L Ed 1477 (1945).

This Court, furthermore, has consistently insisted that the maintenance of the right to privacy shall be enforced by liberal construction of the Fourth Amendment in favor of the individual. *Byars* v *United States*, 273 US 28, 47 S Ct 248, 71 L Ed 520 (1926); *United States* v *Lefkowitz*, *supra*; *Graw* v *United States*, 287 US 124, 53 S Ct 38, 77 L Ed 212 (1932).

This Court's liberal construction of the Fourth Amendment is paralleled by similarity in construction of the Fifth Amendment. In *Counselman* v *Hitchcock*, 142 US 547, 12 S Ct 195, 35 L Ed 1110 (1892), this Court held that a Federal immunity statute failed to proscribe evidence derived from compelled testimony. Accordingly, under the principle that a grant of immunity cannot supplant the Fifth Amendment privilege, and is not sufficient to compel testimony over a claim of the privilege, unless the scope of the grant of immunity is coextensive with the scope of the privilege, the witness' refused to testify was held

proper. The precise holding of *Counselman* on this point declared:

> "... that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply (sic) one, at least unless it is so broad as to have the same extent in scope and effect." *Id.*, at 585.

The holding in *Counselman* clearly could not have been reached unless the Court was willing to construe the scope of the Fifth Amendment as excluding not only direct information from a violation of the privilege, but indirect or derivative information as well.

In *Murphy* v *Waterfront Commission*, 378 US 52, 84 S Ct 1594, 12 L Ed 2d 678 (1964) the Court was presented with the question of whether a state could compel a witness, whom the state had immunized under its law from prosecution, to give testimony that might then be used to convict him of a federal crime. Applying the principle adopted that same day in *Malloy* v *Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed 2d 653 (1964) that the Fifth Amendment privilege applicable to the states through the Fourteenth Amendment, the *Murphy* court held:

> "(A) state witness may not be compelled to give testimony which may be incriminating under federal law *unless the compelled testimony and its fruits cannot be used in any manner* by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to impliment this constitutional rule and accommodate the interests of the State and Federal Government in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits." *Id.* at 79 (emphasis added).

Addressing itself to the question of dispelling the taint of evidence sought to be used against such a witness the court went on to direct that:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities

> have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." *Id.* at 79*.

In emphasizing this latter rule, the Court was requiring that the Defendant be placed in "substantially the same position as if the witness had claimed his (Fifth Amendment) privilege in the absence of a state grant of immunity." (parenthesis added) (Ibid): that neither direct evidence obtained from the testimony nor evidence derived from such testimony would be admissible against the defendant in a subsequent criminal prosecution.

In *Kastigar* v *United States,* 406 US 441, 92 S Ct 1653, 32 L Ed 2d 212 (1972), the U.S. Supreme Court was presented with:

> "... the question whether the United States Government may compel testimony from an unwilling witness, who invokes the Fifth Amendment against compulsory self-incrimination, by conferring on the witness immunity from use of the compelled testimony in subsequent criminal proceedings, as well as immunity from use of evidence derived from testimony." *Id.* at 442.

The statute conferring the immunity on defendant Kastigar reads in pertinent part:

> "(N)o testimony or other information compelled under the order (or any information indirectly or indirectly derived from such testimony of other information) may be used against the witness in any criminal case...." 18 USC §6002.

The Supreme Court interpreted this statute as providing a total prohibition on use so comprehensive, as to bar both the utilization of compelled testimony even as to an "in-

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* See also *Albertson* v *Subversive Activities Control Board,* 382 US 70, 86 S Ct 194, 15 L Ed 2d 165 (1965).

vestigatory lead",* and the use of evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

The Court in *Kastigar* concluded that the requirements of the Fifth Amendment were satisfied by the granting of use immunity, and not transactional immunity. In reaching this result, *Kastigar* relied heavily upon *Murphy* v *Waterfront Commission,* quoting with approval the following pertinent language:

> "We conclude, moreover, that in order to impliment this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any use of such compelled testimony and its fruits." (citations omitted) *Kastigar, supra,* at 406.

Kastigar determined that the right of the government to prosecute would be preserved where the government could establish that their evidence offered against the defendant in a subsequent prosecution was free of taint and derived from an independent, legitimate source. This evidentiary requirement, however, is not to be taken lightly as it goes to the very core of the Fifth Amendment protection. *Kastigar's* language underscores this regard:

> "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." at 406 US 460.

That this evidentiary test and burden of proof is to be applied not only to testimonial immunity situations but to

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* On this point, Justice Powell cited *Albertson* v *Subversive Activities Control Board, supra,* albeit in several footnotes. 406 US at 455, 458, 460. *Albertson* determined that the Fifth Amendment privilege precludes the use of an admission as an investigatory lead, where an immunity statute failed to confer as comprehensive a safeguard against derivative use. *Id* at 382 US 80.

any invocation of the Fifth Amendment privilege itself was clearly manifested in *Kastigar*:

> "This is a very substantial protection, commensurate with that resulting from invoking the privilege itself."
>
> * * *
>
> "The statutory proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions. A coerced confession revealing leads as testimony given in exchange for immunity, is inadmissible in a criminal trial but it does not bar prosecution." At 406 US 461.

It is submitted, herein, that the purpose of *Miranda* v *Arizona, supra,* was to prevent coerced confessions by insuring that certain constitutional protections were made known to the accused held "in custody." Failure to apprise an accused of these safeguards, renders any confession subsequently made, involuntary, and coerced. Such a confession must be suppressed. Similarly, any investigatory leads from that confession ultimately disclosing other incriminating evidence must be suppressed unless the Government can eliminate the taint by demonstrating that such evidence was the result of an independent and legitimate source.

The Fifth Amendment and *Miranda* are not the sole sources of these rules. It is the intimate interaction between the Fifth Amendment *and* the Fourth Amendment, recognized since the promulgation of those Amendments, that constitutes the basis of their formulation. The interrogation of an accused by police is a search; it is a search for information relating to a crime that the police may have probable cause to believe exists within that person's knowledge. Where *Miranda* warnings are not given or defectively given, and a statement obtained, that statement is the fruit of a Fifth Amendment violation, as well as the product of an illegal search and seizure. As shown above, both the Fourth and Fifth Amendments require the suppression of both the direct evidence as well as derivative evi-

dence unless the Government can establish an independent source free of taint for such evidence.

It is the position of this amicus curiae, then, that in the case where a statement obtained in violation of *Miranda* provides investigative leads resulting in the discovery of other evidence incriminating the accused, both the statement itself and the derivative evidence must be suppressed as violations of the Fourth and Fifth Amendments, subject only to proof by the Government of the absence of taint.

II. The standards enunciated by this Court in *Miranda* v *Arizona* represent minimum safeguards against coercive admissions and confessions.

A. The *Miranda* standards are a manageable non-disruptive requirement of the law enforcement function.

This Court's decision in *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) properly declared that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 at 458. In order to compel the observance of such "protective devices" this Court promulgated the mandatory "Miranda Warnings", 384 at 478, 479. The "Warnings" requirement has, to date, been effectively operative for some seven and one-half years.

Petitioner and Amici in Support of Petitioner, Americans for Effective Law Enforcement, and the International Association of Chiefs of Police (hereinafter cited AELE-IACP), now come before this Court to claim that the standards enunciated in *Miranda* are too restrictive and are "unfair for law enforcement officials". Brief of Petitioner, p. 14. Further, Petitioner and Amici claim this Court must now "balance" an individual's Fifth Amendment right to be free from the use against him of coerced or compelled admissions or confessions. Brief of Amici, AELE-IACP, p. 25. Amicus on behalf of Respondent vigorously disputes both of these claims.

Contrary to the assertions of both Petitioner and Amici AELE-IACP, the standards required by *Miranda* do not seriously impede law enforcement. While, in fact, the number of confessions obtained had decreased, the number of convictions have remained, despite this development, constant. Seeburger & Wettick "*Miranda* in Pittsburgh — A Statistical Study," 29 U Pitt L Rev 1, 19 (1967). Perhaps in recognition, the most recent study of the attitudes of law enforcement officials reveals that approximately three-quarters of those interviewed ". . . asserted that confessions were becoming less important in the successful prosecution of cases." Stephens, Flanders and Cannon, "Law Enforcement and the Supreme Court: Police Perceptions of the *Miranda* Requirements", 39 Tenn L Rev 407, 421 (1972).

Essentially, most officers seem to view *Miranda* as an annoyance to be dealt with prior to routine questioning:

> ". . . most officers in each jurisdiction continued to express strong misgivings about the *Miranda* procedure long after it had become a routine part of their work. They seemed to view the decision as a 'stumbling block' to investigation – not so much because of any particular effect on the questioning process per se, but because, as one officer remarked, it required them 'to go through the ritual and paper work and legal technicalities.' They resented the alleged inconvenience and, to an even greater extent, the perceived affront implicit in the requirement of advising suspects prior to interrogation. Most of them were further annoyed by their belief that the justices who fashioned the *Miranda* rules had little understanding or appreciation of the difficulties and hazards of police work. Many of the responses to our questions were, in short, reminiscent of the attacks leveled at the Supreme Court by its most vocal law enforcement critics. We noted, however, that the negative responses of most detectives were less extreme, less embittered, and less direct than many of the public condemnations that greeted *Miranda*." Police Perceptions, *supra*, at 431.

Other studies have similarly rejected any proposition that the *Miranda* standards have had a detrimental effect on the efficiency of law enforcement officials. See Younger, "Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the *Miranda* Decision upon the Prosecution of Felony Cases", 5 Am. Crim. L. Q. 32 (1966); N. Sobel, "The New Confession Standards: *Miranda* v *Arizona*, A Legal Perspective, A Practical Perspective" (1966); Bell, "Racism in American Courts: Cause for Black Disruption or Despair?" 61 Calif L Rev 165, 185 (1973); Mosk, "The Anatomy of Violence," Beverly Hills B J, 10, 15 (Oct., 1968). Obviously both common sense and the aforementioned studies reveal that while the Miranda requirements may be aggravating to law enforcement officers, they are neither too complex to implement nor detrimental to effectiveness.

Amici AELE-IACP next assert that the rigidity of the *Miranda* standards ". . . often requires the reversal of convictions and the freeing of criminal suspects . . .". Brief of AELE-IACP p. 16. In support of this contention, nine actual cases were cited in which "technical" Miranda violations required reversal. Amici implies through presentation of these cases that a technical Miranda violation substantially impaired law enforcement. Amici failed, however, to recognize or apprise this Court of the eventual judicious disposition of each case; more specifically, that in six of these cases new trials were ordered, in two, trials continued without the improper confession, and in one, the appellate court sua sponte imposed a verdict of manslaughter in the absence of the defendant's confession. In essence, these cases reveal nothing more than the routine, mechanical application, and normal consequences of any rule of law established by this Court.

Amicus for Respondent fully concurs with and reasserts the position taken by Respondent and in support also cites to this Court the numerous post-Miranda studies which have consistently revealed that neither law enforcement nor the judicial system have been impaired by application of the Miranda Standards. Cf. Younger, "Interrogation of Criminal Defendants — Some Views on *Miranda* v *Arizona*." 35 Fordham L Rev 255 (1966); Note, "Interroga-

tions in New Haven: The Impact of *Miranda*," 76 Yale L J 1519 (1967); Griffiths & Ayres, "A Postscript to the *Miranda* Project: Interrogation of Draft Protesters" 77 Yale L J 300 (1967); Seeburger & Wettick, "*Miranda* in Pittsburgh — A Statistical Study," 29 U Pitt L Rev 1 (1967); Medalie, Zeitz & Alexander, "Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda*," 66 Mich L Rev 1347 (1968); McCullough, "Balancing the Rights of the Accused and the Public in Constitutional Probity," 54 ABAJ 273 (1968); Driver, "Confessions and the Social Psychology of Coercion," 82 Harv L Rev 42 (1968); Zeitz, Medalie & Alexander, "Anomie, Powerlessness & Police Interrogation," 60 J Cr L Cr PS 314 (1969); Leiken, "Police Interrogation in Colorado," 47 Cenv L J 1 (1970). Respondent proffers as further support of the absence of deleterious effects of the *Miranda* requirements the accord voiced by Petitioner's neighboring Prosecuting Attorney, William A. Cahalan of Wayne County, Michigan:

> "It is my feeling, however, that the prescriptions of the *Miranda* decision can be abided with by law enforcement officials without any great detriment to the interrogation process. There are, of course, inevitably, some cases that will have to be rejected until such time as the law enforcement officers adjust to the new rule and make their investigations correspond therewith.
>
> "I am aware of Mr. Younger's statement concerning the *Miranda* decision and its effect on the cases in his office, and I am in hearty accord with his appraisal of that decision." Marden & Silverstein, "The Growing Importance of Criminal Law", 53 ABAJ 511, 513 FN 20 (1967).

It thus appears that none of the horrors imagined by the *Miranda* dissenters and *Miranda* critics have come to pass. Experience now reveals that the *Miranda* requirements have not occasioned the mass release or acquittals envisioned. 384 US at 542. Nor has *Miranda* significantly altered the number of convictions. Rather, the *Miranda*

Warnings have become fully and effectively assimilated into the daily practices of law enforcement officials and the judicial system. There is clearly no basis for an assertion that the *Miranda* standards have had a detrimental effect upon the administration of justice.

B. The *Miranda* standards satisfy a legitimate and continuing concern for the integrity of custodial interrogations.

Almost two hundred years ago, in Hawkins; Pleas of the Crown, the frailty of the human mind during intense questioning was recognized:

> "The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, (*vide*, O.B. 1786, page 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Pleas of the Crown, *supra*, Section 3, Chapter 46.

A similar recognition prompted this Court in *Miranda* to attempt to protect an individual's Fifth Amendment privilege against compulsory self-incrimination during custodial interrogation.

> "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." 384 US at 467.

As mentioned earlier, Petitioner's challenge to *Miranda* is essentially two pronged. He first attempts to verify his claim that *Miranda* is restrictive and unfair; he then proceeds to claim that the remedy lies in reviving a test unemployed by this Court in over ten years. *Haynes* v *Washington*, 373 US 503, 83 S Ct 1336; 10 L Ed 2d 513 (1963). Basically, Petitioner recommends readoption of the "totality of the circumstances" test, with the presence or absence of warnings also considered, as the basis for admissibility of confessions. Amicus for Respondent challenge both the efficacy and the intellectual integrity of regressing to such a standard.

Initially, the "totality of the circumstances" test is challenged on the basis that it is simply ineffective and unmanageable. Although accompanied by the full impact of embellished due process language, that test requires (a) a showing by the undisputed facts, *Stroble* v *California*, 343 US 181, 190, 72 S Ct 599; 96 L Ed 872 (1951), *Haynes*, *supra*, 373 US at 514; (b) that the accused's will was overborne at the time he confessed, *Haynes*, *supra*, 373 US at 513; *Lynumn* v *Illinois*, 372 US 528, 534; 83 S Ct 917; 9 L Ed 2d 922 (1963); (c) so that the confession cannot be deemed "the product of a rational intellect and a free will", *Blackburn* v *Alabama*, 361 US 199, 208; 80 S Ct 274; 4 L Ed 2d 242 (1960). Thus, the test compels a defendant to produce undisputed facts from an incommunicado interrogation conducted by an adverse party. Moreover, those facts must reveal defendant's will to have been overborne at the time of his confession. These criteria hardly represent objective demonstrable standards relating to the machinations and effects of in-custody interrogations. Indeed, in light of the post-*Miranda* commentaries and studies revealing the subtle psychological and behavioralistic influences utilized in interrogations, (See, e.g., Foster, "Confessions and the Station House Syndrome", 18 De Paul L Rev 683 (1969); Cray, "Criminal Interrogations and Confessions: The Ethical Imperative", 1968 Wis L Rev 173 (1968)), a return to the "totality of the circumstances" test would seem, at best, grossly naive, and, at worst, palpably callous.

Equally objectionable in a return to the test is the implicit authorization to law enforcement officials of "minor"

violations of Constitutional rights. Any retrenchment of the *Miranda* requirements suggests such violations in geometric proportions. Opportunity for officers to impose increasingly flagrant pressures to confess is "justified", ultimately, by the fact that a suspect's guilt is clearly exhibited by his confession. The circularity of such justifications is obvious and serves only to denigrate the integrity of any attempt to determine voluntariness.

Any regression to the pre-*Miranda* "totality" test will signify, clearly, a return to the concept that a trial, in confession cases, represents only the appeal from interrogation. As such, the unaware, uninformed defendant finds trial to be merely an official forum for the admission of the dispositive confession. Perhaps the concept has been most aptly described by Yale Kamisar:

> "Police interrogators may now hurl 'jolting questions' where once they swung telephone books; may now 'play on the emotions' where once they resorted to physical violence, but it is no less true today than it was thirty years ago that
>
> > '[i]n every city our police hold what can only be called outlaw tribunals, — informal and secret inquisitions of arrested persons, — which are, terminology aside, actual and very vigorous trials for crime. ** Centering all upon the confession, proud of it, staking everything upon it, the major canon of American police work is based upon the nullification of the most truly libertarian clause of the Fifth Amendment. * * * The legal courts come into operation only after the police are through; they are reduced to the position of merely ratifying the plea of guilt which the police have obtained, or else holding trials over the minor percentage of arrested persons about whom the police could reach no conclusion. * * * The inquisition held by the police before trial is the outstanding feature of American criminal justice, though no statute recognizes its existence.'
>
> "The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys

are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion. Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.

"In this 'gatehouse' of American criminal procedure — through which most defendants journey and beyond which many never get — the enemy of the state is a depersonalized 'subject' to be 'sized up' and subjected to 'interrogation tactics and techniques most appropriate for the occasion'; he is 'game' to be stalked and cornered. Here, ideals are checked at the door, 'realities' faced, and the prestige of law enforcement vindicated. Once he leaves the 'gatehouse' and enters the 'mansion' — if he ever gets there — the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated." Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in *Criminal Justice in Our Time* (1965), [Author's citations omitted].

This Court explicitly recognized, in *Miranda*, the forcefulness of these arguments. In response, this Court categorically advised the Nation's legal and law enforcement communities that it found as a matter of law, in-custody interrogations to be inherently coercive. 384 US at 467. As a matter of Constitutional law this Court found confessions emanating from such inherently coercive interrogations to be violative of an accused's privilege against compulsory self-incrimination — unless accused was advised of and properly waived certain Constitutional rights. 384 US at 467. Unless one is minimally informed of those Constitutional rights which obtain at custodial interrogations and unless those rights are knowingly waived prior to interrogation, the coerciveness of the interrogational setting threatens the voluntariness of any confession.

"Gatehouse" interrogations continue to play a major role in law enforcement techniques. Cray, Criminal Inter-

rogations, *supra*. *Miranda* requirements serve to ameliorate the impact upon suspects of such interrogations and to assure that "Ours is the accusatorial as opposed to the inquisitorial system." *Watts* v *Indiana*, 388 US 49, 54; 68 S Ct 1347; 93 L Ed 1801 (1949). *Miranda* warnings thus represent a *minimum* effort on the part of our system of justice to shield suspects from coercive interrogations. The warnings have become fully ingrained upon the rubric of law enforcement functions and serve to impute a measure of integrity to "Gatehouse" interrogations. *Miranda* safeguards and encourages the exercise of individual Constitutional rights without significant deleterious effects upon law enforcement officials or the administration of justice. Abandonment of these safeguards would have no basis either in logic or precedent. *Miranda* v *Arizona* should be retained in its entirety.

III. Federal Habeas Corpus is an appropriate forum for reviewing alleged violations of petitioner's Fifth Amendment Rights.

The California Attorney General's Office, in its Amicus Curiae in support of Petitioner, has alleged that Federal Habeas Corpus is not an appropriate method of reviewing *Miranda* violations occurring in state court criminal proceedings.[1] In view of the ramifications of such a contention, the extensive commentary and scholarly writing on the topic of the proper scope of Federal Habeas Corpus jurisdiction and this Court's discussion of the subject, per Justice Powell's concurring opinion in *Schneckloth* v *Bustamonte*, 36 L Ed 2d 854; 412 US 218; 93 S Ct 2041 (1973), a response to the California Attorney General's brief and a more thorough discussion of the contention should assist this court in its consideration of the issue.

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1 See Issue II. "Federal Habeas Corpus should not be permitted to Review Final State Court Criminal Convictions Based on Alleged Violations of *Miranda* v *Arizona*, 384 US 436, supra, or *Wong Sun* v *United States* (citation omitted)." pages 10-15

A. Federal Habeas Corpus is an important vehicle in protecting the individual against intolerable Government illegality, and review of alleged *Miranda* violations occurring in State Proceedings is one effective way to insure that protection.

In his concurring opinion in *Schneckloth* v *Bustamonte,* 412 US 218; 36 L Ed 2d 854; 93 S Ct 2041 (1973), Justice Powell began his analysis of federal habeas corpus review with an historical review of the limits of common law habeas corpus. Stating that "much of the present perception of habeas corpus stems from a revisionist view of the historic function that the writ was meant to perform," *Schneckloth, supra,* at 877, and relying heavily on Professor Oaks' article,[2] Mr. Justice Powell demonstrated how several crucial opinions of the United States Supreme Court during the last quarter century were based in part upon incorrect historical assumptions regarding the writ. Recent scholarly writings certainly buttress Justice Powell's historical position.[3] Yet whether or not a justification for a broad scope of federal habeas corpus collateral review can be found in the common law is a question of minimal import to the discussion. Even Professor Oaks, whose article is heavily relied upon in Justice Powell's opinion, concedes that the scope of the English common law writ of habeas corpus should have little effect on a discussion regarding the proper purview of modern federal habeas jurisdiction.

> "The purpose of the foregoing discussion is not to argue that the Supreme Court reached the wrong decision in *Townsend. Its conclusion that a federal district court, when disposing of a habeas corpus applica-*

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2 Oaks, "Legal History in the High Court — Habeas Corpus" 61 Mich Law Rev 451 (1966).

3 See Oaks, supra, Footnote 3; "Developments in the Law: Federal Habeas Corpus" 83 Harvard L Rev 1038 (1970); Bater, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harvard L Rev 441 (1963).

tion, has the power and sometimes the duty to hold a trial de novo on factual questions already determined in a state court may be a sound decision for our time.

"The limited point urged here is that when the Court asserted that the 1867 act restored rather than extended the powers of the habeas judge, its assertion was plainly at variance with the facts of history." Oaks, "Legal History in the High Court — Habeas Corpus", 64 Mich Law Review 451, 457 (1966).

Indeed, the whole thrust of Professor Oaks' position, as well as that of other scholars discussing the relationship of modern federal habeas corpus jurisdiction to that of the common law, is simply to conclude that the use of habeas corpus as a post-conviction remedy is a relatively recent phenomenon should be examined in that context without "claiming support from a supposed showing that its conclusion really was dictated by — or at least that it restored — the durable content of the ancient law." Oaks, *supra* at 458.[4] This proposition applies to those who would limit, as well as those who wish to sustain the broad scope of federal habeas corpus review.

The real issue then, is whether a review of the policy consideration at play justify such broad powers of review as now exist under federal habeas corpus.

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4 The limitation of an "historical" approach to federal habeas corpus jurisdiction is illustrated by the fact that the often cited Habeas Corpus Act of 1679, passed by the English Parliament, *excluded* from its coverage persons who were confined as a result of a criminal conviction. This left criminal prisoners to resort to habeas corpus at "common law"! (See W. Church, A Treatise on the Writ of Habeas Corpus, 31 (2nd ed 1893); Developments in the Law, supra, Footnote 3, at 1044-1045). The common law writ of habeas corpus pertaining to *criminal* convictions in 1679 was developed by the close of the 1500's and called "*habeas corpus ad subjiciendum.*" "Developments in the Law", supra, footnote 3 at 1043. Thus, a "common law" approach to the proper scope of habeas corpus in criminal cases would rest on either (a) the development of the Habeas Corpus Act of 1679 to the present, or, (b) the writ of *habeas corpus ad subjiciendum* as it was used in England during the 1500's and 1600's. Such an approach would be as unenlightening as it is absurb.

1. ***Federal Habeas Corpus jurisdiction should not be limited to those cases presenting a "Colorable Claim of Innocence", since the principal function of Federal Habeas Corpus is to serve as a dispassionate review of Constitutional Claims, and not retry factual issues.***

It has been suggested recently that federal habeas corpus review might be limited only to petitions presenting colorable claims of innocence.[5] Indeed, this proposition is at the very core of Justice Powell's concurrence in *Schneckloth* v *Bustamonte, supra* at 890:

> "Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent."

The Amicus Curiae Brief of the California Attorney General supports this concept as well, articulating as one of the reasons for a limitation on federal habeas review the fact that "[t]he guilt or innocence of the defendant or respondent is not in doubt." Though the latter quote is clearly an overstatement, and would be more correct if it stated that the guilt or innocence of a petitioner is *rarely in issue*, the proposition (especially as set out by Justice Powell) merits close scrutiny. It is interesting that in developing the proposition, none of the commentators (or for that matter Justice Powell) contends that the function of federal habeas review should be to *retry* the petitioner. Indeed, were this to be at the heart of the "colorable claim of right" theory, the solution would create more problems than it could solve. Were the function of federal habeas corpus to retry the petitioner, then the Federal government and the state's interest in finality of a conviction, the integrity of

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5 See for example Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U Chi L Rev 142 (1970).

the state court system and the effective utilization of limited judicial resources would be destroyed. Thus, though an initial reaction to the "colorable claim of innocence" theory may be that it would tend to further the state's interest in enforcement of substantive state criminal law, it would in the long run create an unjustifiable intrusion into the state's judicial power.

In fact it appears that the converse of Justice Powell's proposition appears true. Federal habeas corpus is a useful and necessary vehicle in the protection of a petitioner's constitutional rights *precisely because* it constitutes a dispassionate review of a state trial court's application of constitutional standards.

> "[E]xpanded use of the writ is responsive to institutional need for a separate proceeding — *one insulated from inquiry into the guilt or innocence of the defendant and designed specifically to protect constitutional rights.* The momentum of the trial process and the trial judge's focus upon the central issue of the accused's guilt or innocence may tend to divert attention from ancillary questions relating to constitutional guarantees." "Developments in the Law — Federal Habeas Corpus." 83 Harvard L Rev 1038, 1056 (1970).

In summary, the very strength of federal habeas corpus review may well be the fact that it functions one step removed from the question of guilt or innocence. It is not being asserted here that the federal courts are not interested in the facts of a criminal case on federal habeas review. *Rather, it is contended that the federal courts should be concerned with the factual setting only in reviewing whether the state court correctly applied the constitutional standard in issue to the facts.* It is this delicate differentiation between the trial court's function and the collateral function of federal habeas corpus review that is at once the strength of federal habeas review as well as the source of confusion. To intimate that the process should be intertwined with the function attributed to the finder of fact (i.e. guilt vs innocence) is to misunderstand the *institutional* structures involved. As suggested by several com-

mentators,[6] once a policy decision is made that a state criminal defendant is to be given the full benefit of the bill of rights through the 14th Amendment, then enforcement of those constitutional rights via a collateral federal proceeding need not affect the state's interest in enforcing its substantive criminal law any more than if the defendant's constitutional rights had been observed at trial.

2. ***Collateral Review of State Criminal Cases through Federal Habeas Corpus serves a necessary purpose which can best be understood by viewing the State and Federal Court Systems as fulfilling distinct institutional objectives.***

Given the conceptual, or institutional, distinctions made in the foregoing argument, it is apparent that one crucial question is left unanswered. That is, if "institutional" factors justify, if not require, a "dispassionate" review of state trial court proceedings, *why then should that review take place at the federal level, rather than via state collateral attack?* This issue is raised, somewhat tangentially, in the California Attorney General's amicus brief at page 13, where it is noted that:

> "A repetition of hearings in Federal Courts in instances where a respondent has had a full and fair state hearing is a useless expenditure of judicial time, personnel, prosecutors and defense counsel. The encouraging of collateral attack frustrates the deterrent effect of the law and the effectiveness of rehabilitation. There is an undue subordination of state courts to lower federal courts with the resulting exacerbation of federal — state relationships and the doctrine of federalism is itself eroded."

The answer to such an attack lies within the concept set forth earlier regarding a difference in the "institutional

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6 See Schaefer, "Federalism and State Criminal Procedure," 70 Harv L Rev 1, 22 (1956); Developments in the Law, supra, footnote 3 at 1058-1059.

setting"[7] of state courts and federal courts exercizing habeas corpus jurisdiction. State courts will most likely be inclined, in passing upon issues of constitutional significance, to heavily reflect a penchant for punishing the guilty and ensuring that their constituency (if the judges are elected) is protected by the incarceration of the defendant. That is, the primary goal is the enforcement of the state's substantive criminal law. Thus, the state courts may tend to subordinate the individual's right to protection from improper state action to the goal of conviction.[8] The federal courts however, have a primary allegiance to the constitution and, *precisely because* they are removed from the proximity of the enforcement of state law they can effectively undertake an objective second look at the state's application of the constitution to the factual setting.

This point leads to a related consideration. The enforcement of constitutional principles via federal habeas review makes possible a more uniform application of those principles for all state criminal defendants. The United States Supreme Court's power to review constitutional issues directly from a decision by the state's highest forum is limited in practicality by the sheer number of cases decided in the fifty (50) states. Thus, federal habeas review may act as a buffer in alleviating the burden on the United States Supreme Court and ensuring a relatively coherent and consistent application of federal constitutional law.

Thirdly, the state's interest in promoting finality in criminal litigation (and presumably progressing with the individual's rehabilitation) is no answer to the question. Certainly costs cannot be used to justify any limitation on the individual's vindication, via collateral review, of a constitutional claim. We would do well to remember Justice Stone's oft quoted words:

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7 This phrase is introduced and used at length in "Developments in the Law", supra, footnote 3. For a fuller discussion of this concept, see pp. 1045-1063 of that article.

8. See Amsterdam, "Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Trial Court," 113 U Pa L Rev 793, (1965); and "Developments in this Law," supra, footnote 3 at 1060-1061.

"There are many rights and immunities secured by the constitution . . . which are not capable of money valuation . . ." *Hague* v *Cio*, 307 US 496, 529 (1939).

Yet in spite of such a universally accepted principle as that stated by Justice Stone, the problem of the administrative burden of federal habeas corpus applications and resulting costs continue to rear their heads when the subject of the scope of federal habeas jurisdiction is in issue.[9] However, aside from citing the raw statistical increase in the *number* of habeas corpus petitions filed in federal courts in recent years, few advocates of more limited habeas jurisdictions make any further evaluation of the problem. At least two recent studies tend to support a conclusion that federal habeas petitions *do not* constitute a severe financial and administrative burden. One such study undertook a detailed analysis of federal habeas corpus petitions filed in Massachusetts in fiscal years 1970, 1971 and 1972.[10] That study suggests that over half of the cases are easily disposed of in summary dismissals or dismissal for failure to exhaust state remedies.[11] Further, the use of magistrates has been one relatively effective and relatively economical way to deal with the remaining cases, though the author concedes the present system requires modification and improvement.[12]

A second study, buttresses the conclusion that the increase in habeas petitions has not resulted in an unmanageable burden on the federal district courts. Government statistics[13] were analyzed in a Harvard Law Review article, the conclusion most likely being a surprise to some:

"The result, of course, has been a vast increase in the number of habeas corpus petitions. In 1968, over

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9 See Justice Powell's opinion in *Schneckloth*, supra, at 882; Friendly, supra, footnote 5; California Attorney General's Amicus Brief, at 13.

10 Shapiro, "Federal Habeas Corpus: A Study in Massachusetts" 83 Harv L Rev 321 (1973).

11 Ibid, pp 333-335, Table IV and Table A.

12 Ibid, pp 361-367.

13 Director of the Administrative Office of The United States Courts, Annual Report 130 (1968).

> 6,300 petitions were filed in federal district courts by state prisoners. This was an increase of 286 percent in just five years. *Yet it is all too easy to overstate the strain that an expanded habeas jurisdiction and expanded federal constitutional rights put on the judicial system. Most of the petitions were quickly dismissed: less than 500 reached the hearing stage, and most of those hearings lasted less than one day.* Nor was the burden on the states staggering: many petitions do not even require a response; *less than ten percent of the state convictions attacked had to be defended at a hearing, and so few prisoners were released that the burden of re-trial must be small.*" "Developments in the Law," footnote 3, *supra*, at 1041, (Emphasis added).

A fourth consideration often cited in support of limiting federal habeas corpus jurisdiction is the "friction" created by this concurrent jurisdiction, or, stated otherwise, the interest of the state courts in preserving their integrity and autonomy.[14] One answer to this point should be apparent from the foregoing discussion — that is that necessity for federal habeas review is the culmination of institutional rather than personal factors. Yet another answer is apparent, and that is that though "friction" between the institutions is potentially a problem,[15] the federal courts take pains to prevent it. The federal habeas statutes, and most importantly 28 U.S.C. §2254, contain a very effective mechanism which helps to enforce the state's interest in preserving its own judicial integrity and autonomy. It is clear that a federal court will not entertain a federal habeas petition unless "it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. §2254(b). This "remedy" of effectively remand-

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14 See *Schneckloth* v *Bustamonte*, supra, opinion by Mr. Justice Powell at 881, 884, 890-891; Friendly, supra, footnote 5.

15 It is somewhat difficult to understand why proponents of this position do not also recognize that the same factors would appear to apply to direct review by the United States Supreme Court of State proceedings.

ing the cause to the state courts is consistently used and as suggested by one very recent study,[16] may be *the most common* method of disposing of federal habeas petitions, accounting for over fifty percent (50%) of all federal habeas dispositions in Massachusetts from 1970 to 1972. Therefore, it would appear that the federal courts not only respect the autonomy and integrity of the state judicial systems, but perhaps too often "remand" a case to the state courts without looking at it on its merits, in deference to state autonomy at the expense of the defendant.

Such extreme deference may well be ill founded. Although there may exist a presumption of regularity in state proceedings, Professor Reitz' study in 1960 of thirty-five (35) successful federal habeas corpus applications documented state court abuses in treatment of even the most meritorious cases.[17]

Such abuses, while not *necessarily* being a strong argument *per se* in opposition to the doctrine of state exhaustion, certainly constitute very persuasive authority for demonstrating the necessity of federal habeas corpus relief for state prisoners.

It appears that all of the objections to expanded federal habeas corpus review then, are not as strong as they appear at first glance. The state's interest in the enforcement of its substantive law, autonomy, and finality in the criminal process all are legitimate considerations. However, such considerations must be weighed in light of the (necessarily) different emphasis of interests regarding state court -vs- federal habeas corpus jurisdiction, the expansion of constitutional safeguards in the last quarter century, the need for a greater uniformity in the application of federal constitutional law in state criminal procedure, and the relatively minimal cost considerations and administrative inconvenience resulting from increased federal habeas corpus applications. When balanced, the state interests are not defeated, and, where subordinated, are done so

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16 See Shapiro, supra, footnote 10 at 333-335.

17 Reitz, "Federal Habeas Corpus: Postconviction Remedy for State Prisoners," 180 U Pa L Rev 461 (1960).

as a result of a proper balancing of different institutional positions of the state and federal courts.

In a most cogent statement, one commentator pointed out that "[m]uch of the objection to federal habeas may be, at bottom, simply disagreement with constitutional decisions that expend a criminal defendant's procedural rights."[18]

B. Even if this Court should limit Federal Habeas Corpus review in relation to appeals based on Fourth Amendment exclusionary case as suggested by Justice Powell in *Schneckloth*, no such limitation should apply to review of *Miranda* issues since the same factors do not apply to Federal Collateral Review of Fifth Amendment Issues.

The California Attorney General, in his amicus brief, notes that Justice Powell has proposed that federal habeas corpus review be limited when issues raised focus on search and seizure questions. This statement is certainly a fair representation of Justice Powell's proposal in his concurring opinion in *Schneckloth* v *Bustamonte, supra,* at 876-891. However, issue must be taken with the Attorney General's conclusion at page 11 that "The same reasoning is applicable to review of Miranda contentions . . ." Indeed, not only does the conclusion constitute a quantum jump in its reasoning, but it is a conclusion that the majority of the court rejected in *Schneckloth.* The opinion of the court, delivered by Mr. Justice Stewart, took care to point out:

> "The considerations that informed the Court's holding in Miranda are simply inapplicable in the present [4th Amendment] case. In Miranda the court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. The Court concluded that '[u]nless adequate protective devices are employed to dis-

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18 "Developments in the Law", supra, footnote 3 at 1042.

> pel the compulsory inherent in custodial surroundings, no statement obtained from the defendant can truely be the product of his free choice. [citations omitted]' " *Schneckloth, supra,* at 36 L Ed 2d 874.

The thrust of the *Schneckloth* opinion is that the question involved, i.e. "voluntariness" as applied to the Fourth Amendment Search situation, is "immeasurably far removed from 'custodial interrogation.' " *Schneckloth, supra* at 865. While the Fourth Amendment is viewed as having a prophylactic effect in relation to the limits of state sanctioned police conduct, the Fifth Amendment goes to the very core of insuring the fairness of the defendant's trial. For this reason, *the argument* (whether correct or not) that federal collateral review of Fourth Amendment claims serves no deterrent function[19] *is inapplicable* to the Fifth Amendment. As brought out by Mr. Justice Stewart, the protections of the *Fifth Amendment* go to the very *reliability of the truth — determining process and the fairness of the trial itself,* while

> "[t]he protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter's opinion for the Court put it in Wolf v Colorado, 338 US 25, 27; 93 L Ed 1782; 69 S Ct 1359, the Fourth Amendment protects the 'security of one's privacy against intrusion by the police' " . . . *Schneckloth, supra* at 36 L Ed 2d 871.

Therefore, while the Fifth Amendment guarantees go to the very integrity of the fact finding process, and may well determine the fairness of the trial, the Fourth Amendment stands "as a protection of quite different constitutional values" rarely touching upon the fairness of a trial, but rather expressing "the concern of our society for the right of each individual to be let alone." See *Tehan* v *United*

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19 See for example Mr. Justice Powell's discussion of this point in *Schneckloth*, supra, at 887.

States ex rel Schott, 382 US 406, 416; 15 L Ed 2d 453; 86 S Ct 459.

In sum, the considerations which informed the court's holding in the [Fifth Amendment] *Miranda* decision were conceded to be "inapplicable" to the *Schneckloth* discussion of "voluntariness" and "consent" as applied to the *Fourth Amendment*. It follows that *those same considerations*, when used in support of limiting federal habeas corpus *Fourth Amendment* review are inapplicable to any limitation on Fifth Amendment collateral review.

CONCLUSION

In light of the reasons set forth herein, amicus curiae respectfully request that the decision in this cause of the United States Court of Appeals, Sixth Circuit, be affirmed, and that the Respondent's conviction be reversed.

Respectfully submitted,

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